Nos. 18-1686, 18-1771

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AIRGAS USA, LLC
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ORAL ARGUMENT STATEMENT

The Board believes that this case involves the straightforward application of well-settled law to the credited evidence. However, to the extent the Court believes that oral argument would be helpful, or grants the Company's request for oral argument, the Board requests the opportunity to participate.

JURISDICTIONAL STATEMENT

This case is before the Court on a petition for review of Airgas USA, LLC ("the Company"), and the cross-application for enforcement of the National Labor Relations Board ("the Board"), of the same Board Decision and Order, which issued on June 13, 2018, and is reported at 366 NLRB No. 104. (JA 364-85.)[1] The petition and the cross-application are timely because the National Labor Relations Act ("the Act") (29 U.S.C. §§ 151, et seq.) imposes no time limitation for such filings.

The Board had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. §§ 160(e) and (f)), because the Order is final and the unfair labor practices took place in Ohio.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(4) and (1) of the Act by issuing a written warning to

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[1] "JA" refers to the Joint Appendix filed by the Company. "SA" refers to the Supplemental Appendix the Board is filing with this brief. "Br." refers to the Company's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

employee Steven Rottinghouse, Jr. in retaliation for participating in Board activity, including filing two unfair-labor-practice charges with the Board.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by Rottinghouse, the General Counsel issued a complaint alleging that the Company violated 8(a)(4) and (1) of the Act (29 U.S.C. § 158(a)(4) and (1)) by issuing Rottinghouse a written warning in retaliation for participating in Board activity. (D&O 1, 10, JA 224.) A Board administrative law judge conducted a hearing on the complaint allegation, and issued a decision and recommended order finding that the Company had violated the Act as alleged. (D&O 1, 10-22.)

On review, the Board adopted the judge's rulings, findings, and conclusions with some modification, and adopted her recommended order. (D&O 1-4.) The Board's findings of fact are detailed below, followed by a summary of the Board's Conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company sells and distributes industrial gases from several facilities, including the Cin-Day plant in Cincinnati, Ohio. The Company employs commercial drivers who drive trucks with attached trailers to transport cylinders of those gases to and from the Company's customers. The drivers generally are

responsible for properly securing the cylinders in the trailers of their trucks so that the cylinders do not rattle or shift during transport. At all relevant times, the Company's drivers were represented by Teamsters Ohio Local 100 ("the Union"). (JA 364, 374, 377 n.15; JA 233, 259, 308.)

The Company's disciplinary practices varied at times from the terms of the collective-bargaining agreement it had with the Union. Article 22 of the contract states that disciplinary action starts with a written warning. (JA 377; JA 323.) Despite having no provision for verbal warnings in the contract, the Company has routinely issued both documented and undocumented verbal warnings to employees. (JA 378-79; JA 243, 245-47, 250-52, 257, 302.)

B. Rottinghouse Files Two Unfair-Labor-Practice Charges Against the Company; and the Board's Regional Office Undertakes Investigations of Both Charges

Rottinghouse was a long-term, and active union member, who began working for the Company as a commercial driver in 2010. (JA 374; JA 133-35, 335.) On May 14, 2015,[2] Rottinghouse filed an unfair-labor-practice charge with the Board alleging that the Company had threatened to change employees' terms and conditions of employment because of previous grievances and Board charges he had filed. (JA 364, 374-75; JA 326.)

[2] All dates are in 2015 unless otherwise indicated.

In late June, the Company suspended Rottinghouse for three days, alleging that he had improperly completed Department of Transportation ("DOT") paperwork off the clock on June 22. (JA 375; JA 254, 328.) Prior to this incident, Rottinghouse had maintained a good safety and driving record, with no DOT or Company rule violations. (JA 374; JA 259-60.) On July 7, Rottinghouse filed another unfair-labor-practice charge with the Board, alleging that the real reason for his June discipline was retaliation for engaging in protected union activities and for having filed the previous Board charge in May. (JA 364, 375; JA 328.)

The Board's Regional Office investigated both unfair-labor-practice charges. On July 13, Company Operations Manager Clyde Froslear and Plant Manager David Luehrmann provided affidavits to the Region regarding the May, 2015 charge. While the Region was still investigating both charges, the Company gave Rottinghouse the written warning at issue in this case, based on the August 3 incident described below. (JA 364, 374-75, 382; JA 232-37, 256.)

C. Froslear Notices Cylinders Tilting In The Trailer of Rottinghouse's Parked Truck; Froslear Grabs His Camera And Takes Pictures But Neither Speaks to Rottinghouse Nor Physically Inspects the Cylinders

On August 3, Rottinghouse spent the morning driving his truck to collect gas cylinders from customers. (JA 364, 375; JA 136-37.) When Rottinghouse returned to the Company's facility, he parked his truck in the yard close to the facility. (JA 375; JA 139-40.) He went into the building. (JA 375; JA 140.)

Operations Manager Froslear noticed that the cylinders in the trailer of Rottinghouse's truck were tilting and improperly secured. (JA 364, 375; JA 30.) Froslear made no effort to speak with Rottinghouse. (JA 364, 375; JA 39, 139-42.) Instead, Froslear went inside the facility, grabbed his camera, and returned to the truck where he took pictures to document the unsecure cylinders. (JA 382; JA 39-41, 140-42.) He made no attempt to physically inspect the cylinders by touching them, nor to secure them or to direct Rottinghouse to do so. (JA 364, 382; JA 28-30.) Having seen Froslear taking photos, Rottinghouse returned to his truck to see what Froslear was looking at. The pair made eye contact, but neither said anything. (JA 364, 375; JA 141-44.) Froslear returned inside. (JA 364; JA 143.) He then proceeded to watch Rottinghouse from the window of the facility, where he saw Rottinghouse climb onto the back of his truck, straighten and re-strap the cylinders, and drive off. (JA 364, 375; JA 31-32, 43, 65, 139-144, 146.) Froslear made no attempt to speak with Rottinghouse about the incident on that day. (JA 364, 382; JA 37-38, 65.)

D. The Next Day, Froslear Emails Driver Trainer MacBride About The Cylinder Incident, Ignores MacBride's Questions If Rottinghouse Caught It Before Leaving, And Asks For the Strongest Language About Securing Cylinders

On August 4, Froslear emailed a photograph of the leaning cylinders to the Company's driver trainer, Mark MacBride. Froslear's e-mail asked, "What do you think about this? Look good to you?" MacBride responded, "No. With the

cylinders being offset, we would be hit for an insecure load just by how it looks. Where is this truck?" Froslear answered, "Cin-Day." MacBride then asked if the driver caught it before leaving. Rather than answer this question, Froslear wrote "I saw it when he pulled into the yard." When MacBride again asked if it was fixed before leaving, Froslear again did not reply that the cylinders had been secured. Instead, he answered, "This is the way it was when he pulled in after his run." MacBride emailed, "Unacceptable." Froslear then wrote, "Where would I find the strongest language about load securement that drivers are trained to?" MacBride told him to look in the driver training manual. (JA 364-65; JA 305-07.)

E. The Company Gives Rottinghouse a Written Warning For the Cylinder Incident; Rottinghouse Files A Grievance

On August 6, Froslear and Plant Manager Luehrmann met with Rottinghouse and union representative Barry Perkins. Froslear and Luehrmann issued Rottinghouse a written warning for failing to secure cylinders on his truck.[3] (JA 365, 376, 376 n.13; JA 256.) The written warning stated six times that the failure to secure cylinders was a safety issue. The warning directed Rottinghouse to "take personal responsibility for creating and maintaining a safe environment," to properly secure cylinders, and to follow other DOT and safety procedures. (JA 376; JA 256.)

[3] The written warning was dated August 5, but the parties stipulated it was issued on August 6. (JA 376, 376 n.13.)

During the August 6 meeting, Froslear told Rottinghouse that when Rottinghouse pulled into the yard, Froslear "heard loose cylinders rattling" and when Rottinghouse came to a stop, Froslear "saw them move, fall forward." (JA 376; JA 344.) Rottinghouse told Froslear he had seen Froslear taking pictures, and asked Froslear why Froslear did not come to get him. Froslear responded that he took pictures so he could send them to MacBride. (JA 376; JA 344.)

That same day, Rottinghouse filed a grievance pursuant to the collective-bargaining agreement. In the grievance, he acknowledged that the cylinders were leaning "a little bit" but stated they were not rattling. (JA 377; JA 335.) The grievance also stated that although the Company had given him a written warning, it "only should be verbal;" the "leaning [cylinders] were fixed before leaving [the] yard;" and the "written warning is excessive, should be removed." (JA 377; JA 335.)

F. The Parties Meet About Rottinghouse's Grievance; Froslear Cites The Collective-Bargaining Agreement to Justify A Written Rather Than A Verbal Warning

On September 2, Rottinghouse and Perkins met with Froslear and Luehrmann about Rottinghouse's grievance. (JA 377; JA 336.) Rottinghouse stated that he should not have received a warning letter. Froslear asked Rottinghouse and Perkins what part of the collective-bargaining agreement they were alleging the Company had violated in order to warrant a grievance. Perkins

responded that the "warning letter should have been a verbal according to the contract." (JA 377; JA 336.) Froslear replied that he read Article 22, Section A of the collective-bargaining agreement to justify giving Rottinghouse a written warning. Froslear continued, "I believe this is what we did," and asked, "Do you disagree?" Rottinghouse replied that "a written warning is too severe," and that "it should have been a verbal." (JA 336.) When Froslear refused to change the discipline to a verbal warning, the meeting ended. (JA 377; JA 336.)

G. The Parties Sign A Settlement Agreement Requiring The Company to Post a Notice Regarding Rottinghouse's May 14 Unfair-Labor-Practice Charge; The Region Dismisses His July 7 Unfair-Labor-Practice Charge, Subject To An Appeal

On September 3, the Region and the Company entered into a settlement agreement regarding Rottinghouse's May 14 unfair-labor-practice charge. The settlement required the Company to post a remedial notice. (JA 375 n.6; SA 1-2.) On September 9, Froslear signed the remedial notice. (SA 3.)[4] On September 22, the Region dismissed Rottinghouse's July 7 unfair-labor-practice charge, subject to an appeal.[5] (JA 375; JA 329.)

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[4] That case nonetheless remains open. Board Case No. 09-CA-152301. *See* https://www.nlrb.gov/case/09-CA-152301 (last visited October 9, 2018, 1:27 PM).

[5] On November 5, the Board dismissed Rotttinghouse's appeal. (JA 375; JA 332.)

H. In the Final Grievance Meeting About the Written Warning, Froslear Again Cites the Collective-Bargaining Agreement; Union Representative Ron Butts Asks Froslear to Reduce the Written Warning To a Verbal Warning But Froslear Responds That He Won't Reduce The Discipline Because It Was Not His First Offense and the Incident Was Severe

On September 23, Rottinghouse and Perkins, joined this time by union representative Ron Butts, met again with Frosler and Luehrmann. Butts asked that Rottinghouse's discipline be lowered to a verbal warning. Froslear asked Butts to read article 22, paragraph A of the collective-bargaining agreement stating that discipline starts with a written warning. (JA 365, 377; JA 337.) Butts then said Froslear should reduce the writing warning to a verbal because it was Rottinghouse's first offense. Froslear responded that it was not Rottinghouse's first offense. Later in the meeting, Butts again asked if Froslear would reduce the written warning to a verbal warning, and Froslear said, "No because it is not Steve's first DOT violation and because of the severity of the event." (JA 365, 377; JA 337.)

I. Company Discipline of Other Employees

As discussed above, the Company issued numerous verbal warnings to employees despite the collective-bargaining agreement listing written warnings as the first disciplinary step. The Company gave one such verbal warning to driver John Jeffries, who had a preventable vehicle accident on May 10, 2013. (JA 379; JA 302.) Both Froslear and MacBride considered preventable accidents to

constitute a severe offense. (JA 379; JA 87, 212.) The Company also gave a verbal warning to driver Edgar Reed for talking on the phone while he was driving, which was a DOT violation for which he could have been subjected to a $2,570 fine, and for which the Company could have been subject to an $11,000 fine. (JA 379; JA 247.)

The Company gave driver Bill Huff a written warning on March 10, 2011 for "transporting unsecure cargo." (JA 378; JA 238.) Huff had returned from a run and had a loose cylinder on its side on the floor of his trailer, one pallet with unsecured cylinders, and another pallet containing liquid containers only secured with one strap. (JA 378, 383; JA 238.) The Company documented this as a DOT violation, and he was required to review DOT and other driver requirements for securing cylinders, and to ride with a driver trainer. (JA 378; JA 238.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Pearce and McFerran; Member Kaplan, dissenting) agreed with the administrative law judge that the Company violated Section 8(a)(4) and (1) of the Act by issuing a written warning to Rottinghouse for the cylinder incident. (JA 364-373.) The Board's Order requires the Company to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (JA

384.) Affirmatively, the Order requires the Company to remove any reference to the written warning from Rottinghouse's personnel file, notify him of that action and that the written warning will not be used against him in any way, and to post a remedial notice. (JA 384.)

STANDARD OF REVIEW

The Court must uphold the Board's factual findings if they are supported by substantial evidence, even if the reviewing court could justifiably make different findings if it considered the matter de novo. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 225 (6th Cir. 2000). "The Board's application of the law to the facts is also reviewed under the substantial evidence standard, and the Board's reasonable inferences may not be displaced on review." *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1297 (6th Cir. 1988). "Deference to the Board's factual findings is particularly appropriate where the record is fraught with conflicting testimony and essential credibility determinations have been made." *Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (quotation marks and citation omitted); *see also Gen. Fabrications Corp.*, 222 F.3d at 225. Credibility determinations made by an administrative law judge, and adopted by the Board, should be affirmed "unless they are inherently unreasonable" or "self-contradictory." *Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1199 (6th Cir. 1996).

With respect to legal findings, "this Court is deferential to the Board's interpretation" of the Act and, as "long as the [Board]'s interpretation of the statute is 'reasonably defensible,' this Court will not disturb such interpretation." *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 957 (6th Cir. 2006) (quoting *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 844 (6th Cir. 2003)). The Court "may not reject the Board's interpretation 'merely because the courts might prefer another view of the statute.'" *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552, 559 (6th Cir. 2013) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

SUMMARY OF ARGUMENT

The Board reasonably found that the Company violated the Act by issuing Rottinghouse a written warning instead of a verbal warning for the cylinder incident because he engaged in Board activity. The credited evidence clearly establishes that Operations Manager Froslear seized on the cylinder incident shortly after Rottinghouse had filed unfair-labor-practice charges as an opportunity to punish him for filing those charges. The Board's finding that the Company was unlawfully motivated in taking that adverse action is supported not only by the close timing between Rottinghouse's Board activity and the written warning, but also by the ample evidence that Froslear trumped up safety concerns in order to justify Rottinghouse's harsher punishment. Froslear's actions the day of the

incident—grabbing his camera to document the tilting cylinders but failing to physically inspect them or talk to Rottinghouse before he left the facility—belie any such safety concerns. Froslear's later evasiveness in answering Driver Trainer MacBride's questions about whether Rottinghouse had corrected the condition before driving away from the facility (which he did), and in seeking MacBride's advice on where to locate the strongest language to use in warning Rottinghouse, further supports the Board's finding that Froslear had an "out to get you" attitude toward Rottinghouse. Moreover, the Company disciplined Rottinghouse more harshly than other employees who only received verbal warnings for what the Company admits are serious offenses. Given these circumstances, and the additional evidence of Froslear's shifting rationales for the written warning, such as the collective-bargaining agreement (which was otherwise ignored), and progressive discipline (which was not initially relied on), the Board reasonably found that the Company's reasons for giving Rottinghouse the writing warning were a pretext to mask the Company's unlawful motivation.

The Company has failed to establish, as it must, that the Board's findings are not supported by substantial evidence. Ignoring that the administrative law judge discredited Froslear's testimony on the key points for which the Company relies, the Company improperly urges the Court to accept his discredited explanations for his actions, and its alternative story of what happened. As this Court has held, this

is simply insufficient to impugn the Board's reasonable findings and fails to meet the requisite substantial-evidence standard of review.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(4) AND (1) OF THE ACT BY ISSUING ROTTINGHOUSE A WRITTEN WARNING IN RETALIATION FOR HIS BOARD ACTIVITY

A. Applicable Principles

An employee's right to participate in Board processes is guaranteed by Section 8(a)(4) of the Act, which makes it an unfair labor practice to discriminate against an employee for engaging in protected activities such as filing Board charges or testifying in an unfair labor practice proceeding. 29 U.S.C. § 158(a)(4); *NLRB v. Scrivener*, 405 U.S. 117, 121-25 (1972); *United Auto Workers v. NLRB*, 514 F.3d 574, 586 n.14 (6th Cir. 2008).[6] The Board has found that the purpose of Section 8(a)(4) is to "assure an effective administration of the Act by providing immunity to those who initiate or assist the Board in proceedings under the Act." *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947). Discrimination against employees may include a range of adverse employment actions, *see, e.g.*, *NLRB v. Fry Foods, Inc.*, 609 F.2d 267, 270 (6th Cir. 1979) (employer violated Section 8(a)(4) by

[6] A violation of Section 8(a)(4) creates a derivative violation of Section 8(a)(1) of the Act, which makes it "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Chinese Daily News*, 346 NLRB 906, 933 (2006), *enforced*, 224 F. App'x 6 (D.C. Cir. 2007).

discharging, suspending, demoting, and reducing wages of employees), as well as issuing written warnings, *see, e.g., Mid-Mountain Foods, Inc. v. NLRB*, 11 F. App'x 372, 376, 377 (4th Cir. 2001) (written warning violated Section 8(a)(4)).

To determine whether an employer violated Section 8(a)(4), the Board applies the test articulated in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transp. Mgmt.*, 462 U.S. 393, 404 (1983). *Accord NLRB v. Overseas Motor Inc.*, 721 F.2d 570, 571 (6th Cir. 1983). Under *Wright Line*, the Board determines whether an employee's protected activity was "a motivating factor" in the employer's decision to take adverse action against him. *Transp. Mgmt.*, 462 U.S. at 400-02. If so, the adverse action is unlawful unless the record as a whole compels the Board to accept the employer's affirmative defense that it would have taken the same action even absent the protected activity. *Id.* at 397, 401-03; *accord NLRB v. Galicks*, 671 F.3d 602, 608 (6th Cir. 2012). If the employer's proffered reasons for its actions are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer has failed to establish its affirmative defense. *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982); *see also Conley v. NLRB*, 520 F.3d 629, 643 (6th Cir. 2008); *Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 693 (6th Cir. 2006).

Unlawful motivation is a factual question that the Board may find established on circumstantial as well as direct evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *see also Temp-Masters*, 460 F.3d at 689. In doing so, the Board may rely on a variety of factors, including the questionable timing of the adverse action, inconsistencies between the proffered reason for the adverse action and other actions of the employer, and the disparate treatment of certain employees. *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995); *see also Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir.1985). The pretextual nature of the employer's explanation for the adverse action can serve as additional evidence of unlawful motivation. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075 (D.C. Cir. 2016); *Accord Conley*, 520 F.3d at 644.[7]

Courts are particularly "deferential when reviewing the Board's conclusions regarding discriminatory motive." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000). "Simply showing that the evidence supports an

[7] The Company's citation (Br. 16, 25) to *Newcor Bay City*, 351 NLRB 1034 (2007), is misleading. In that case, the administrative law judge's decision contained language about "a link, or nexus" in its discussion of the *Wright Line* test, *id.* at 1036, but the Board on review restated the necessary showing without any such additional requirement. *See* 351 NLRB 1034 n.4. And there, the Board's restatement of the test, which corrected the judge's decision, is consistent with this Court's precedent. *See, e.g.*, *Conley*, 520 F.3d at 642 (describing *Wright Line* test with no such additional requirement).

alternative story is not enough; [the employer] must show that the Board's story is unreasonable." *NLRB v. Galicks, Inc.*, 671 F.3d at 608.

B. The Company Violated the Act by Issuing Rottinghouse a Written Warning

The Board reasonably found that Rottinghouse's participation in Board activity was a motivating factor in the Company's decision to issue him the written warning, and that the Company failed to show that it would have issued that degree of discipline against him had he not engaged in his protected activity. The Board's findings underlying its conclusion that the Company violated Section 8(a)(4) of the Act are fully supported by the credited evidence on the record as a whole, and the Company's contentions are contrary to the credited evidence or otherwise mistaken.

The Company's challenge to the Board's finding is quite narrow. As the Board noted, "[t]he judge found, and it is undisputed, that Rottinghouse's filing of unfair labor practice charges was protected activity and that the [Company] knew about the filings." (D&O 2.) As shown below, the credited evidence amply supports the additional factors the Board relied on in finding the violation, including the close timing between his Board activity and the written warning, the animus shown by Operation Manager Froslear's action (and inaction) on the day of the cylinder incident that contradicted his purported concern for safety, the disparate treatment of Rottinghouse as compared to other employees who only

received verbal warnings for comparable offenses, and the pretextual nature of the Company's shifting explanations for issuing the written warning.

First, the closeness in time between Rottinghouse's protected activity and his receipt of the written warning supports an inference of unlawful motivation. (JA 365, 365 n.7, 382.) Rottinghouse's August 6 written warning occurred during an ongoing Board investigation of both unfair-labor-practice charges that Rottinghouse had filed against the Company (on May 14 and July 7), and, as the Board noted, "not long after" Froslear and Luehrmann had given affidavits regarding the first charge (on July 13). Thus, the Company gave Rottinghouse his written warning only three weeks after the Company officials had given their investigatory affidavits, and "only a month had passed since Rottinghouse filed his second charge." (JA 365 n.7.) *See e.g.*, *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 4 (2016) (Section 8(a)(4) violation found where discipline was imposed within weeks of a Board hearing, which took place three months after charge was filed), *enforced*, 713 F. App'x 152 (4th Cir. 2016).

The Company asserts (Br. 17-18) that the timing was not close enough to be suspicious because the Company was aware, as of April, that Rottinghouse had filed even earlier unfair-labor-practice charges. But the Company's knowledge of protected activity one month earlier than May is insignificant given Rottinghouse's repeated and escalating activity through July. And the timing is no less suspicious

because the Company did not immediately retaliate against him at the first sign of any protected activity. *See Bates Paving and Sealing*, 364 NLRB No. 46, slip op. at 3-4 (2016) (citing *In re United Parcel Service*, 340 NLRB 776, 777 n.10 (2003) (finding that a 6-month gap between protected activity and discharge was not too long because "[a]n employer might wait for a pretextual opportunity to discipline an employee for engaging in protected activity.")).

The record evidence also supports the Board's finding, grounded upon unchallenged credibility determinations, that Froslear's behavior on August 3 and 4 showed he was "out to get" Rottinghouse, and "more intent on punishing him for reasons other than ensuring public safety." (JA 365 n.8, 383.) Froslear, supposedly concerned about safety after noticing that the cylinders were unsecure, nonetheless left the area to obtain a camera "rather than seek out Rottinghouse or wait by the truck until Rottinghouse returned." (JA 365 n.8.) As the Board also noted, and the Company does not challenge, Froslear's testimony that he "did not know where Rottinghouse was at" was "dishonest." (JA 381.) Moreover, after Rottinghouse returned to his truck, Froslear left without comment and retreated to his office—despite this being the obvious opportunity to correct the problem and ensure that Rottinghouse's cylinders were safely secured before he left for his next run. (JA 365 n.8.) Given this credited evidence, the Board drew a reasonable inference that Froselar's actions on August 3 suggest that he was "focused on

catching Rottinghouse in an infraction and creating a record against him rather than correcting the problem." (JA 365 n.8.)

The Board additionally found that Froslear's animus was demonstrated by his failure to conduct a meaningful investigation of the cylinder incident, which further demonstrates discriminatory intent. *See New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998), *enforced*, 201 F.3d 592 (5th Cir. 2000) (failure to conduct meaningful investigation and give the employee an opportunity to explain are clear indicia of discriminatory intent). To wit, Froslear failed to physically inspect the cylinders by touching them to see if they were at risk of moving. Although he testified (JA 30) that he did not have to do so because he "saw them move," the Board expressly discredited this excuse, finding that his claim that he saw them move was a "misrepresentation" that he "fabricated" as part of a story "in order to bolster his reasons for issuing the warning letter." (JA 366 n.3, 381, 383.) The Company has tellingly ignored this credibility finding as well.

Moreover, the Board noted that Froslear's "whole interaction" with MacBride via e-mail on August 4 buttresses its finding that Froslear had "an out to get you attitude" toward Rottinghouse. (JA 366, 366 n.11, 383.) Not only did Froslear insist to MacBride that he find the "strongest language" about securing cylinders, but he also did not directly answer MacBride's questions as to whether the tilting cylinders were caught or fixed before the truck left the facility, even

though Rottinghouse had indeed secured them before leaving. The Board reasonably concluded that Froslear's evasiveness, which occurred right before Froslear asked for the strongest language, "adds further context to the 'strongest language' request," and when "combined with the record as a whole, provides "strong evidence of [the Company's] animus toward Rottinghouse's protected activity of filing charges." (JA 366 n.11.)

The Company barely challenges (Br. 18-19) the Board's findings about Froslear's actions on August 3 and 4, making a cursory assertion (Br. 18) that Froslear's investigation was proper, and citing to a sentence in Member Kaplan's dissent generally deeming the Board's analysis to be speculative, with no further development. Such cursory and general assertions that the Board should have made different findings do not suffice to meet the substantial-evidence standard of review. As this Court has explained, "[s]imply showing that the evidence supports an alternative story is not enough; [the employer] must show that the Board's story is unreasonable." *Galicks*, 671 F.3d at 608. *Accord Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2017) (the court will reverse Board's finding "only when the record is so compelling that no reasonable factfinder could fail to find to the contrary").

The Board also reasonably found that the Company's harsher treatment of Rottinghouse, as compared to Jeffries and Reed, constitutes further evidence of

unlawful motivation. (JA 365, 383.) Froslear and MacBride both testified that they considered a preventable accident, like the one Jeffries had, to be a "severe" offense, but Jeffries only received a verbal warning. Although the Company complains that Jeffries' warning was "likely" issued by Luehrmann without authorization from Froslear, the Company admits in its brief that Froslear provides "final approval for the issuance of corrective actions." (Br. 9.) *See also* JA 102 (Froslear involved in all discipline); JA 106 (normal procedure is to get Froslear's approval for discipline). And in any event, regardless of whether or when Froslear knew about the lesser discipline of Jeffries, the Company does not deny that it was issued and stands as an example of disparate treatment.[8]

The Company also gave a verbal warning to driver Edgar Reed for talking on the phone while he was driving, a DOT violation for which he could have been subjected to a $2,570 fine, and for which the Company could have been subject to

[8] The Company asserts (Br. 21, 21 n.3) that the Board improperly discredited Froslear because the judge erroneously found that Luehrmann provided the Jeffries discipline to Froslear in connection with the General Counsel's subpoena. (JA 366 n.14, 379.) To the contrary, support for the judge's finding is found at JA 105, where Luehrmann answers "I thought so" to a question about whether he turned the Jeffries discipline over to Froslear per the subpoena. In any event, the Company did not except to the Board's credibility finding before the Board. *See* SA 6 (failing to except to lines 16-22 of the judge's decision, found at JA 350), precluding the Court from considering a challenge to this finding. *See* Section 10(e) of the Act (29 U.S.C. Section 160(e)).

an $11,000 fine. (JA 379; JA 247.) The Board found it was "incredulous" that Froslear would not consider a violation such as this serious enough to warrant more than a verbal warning. (JA 366.)[9] The Company also misses the mark (Br. 20) by asserting that because the verbal warning was originally a written warning, it was somehow not evidence of disparate treatment compared to Rottinghouse's written warning. The fact remains that the ultimate discipline that issued was only a verbal warning. Nor does *M&G Convoy, Inc.*, 287 NLRB 1140 (1988), cited by the Company (Br. 20 n.2), hold otherwise. That case was about whether animus

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[9] The Company is wrong (Br. 21 n.3) that there is no record support that "Froslear did not consider a commercial truck driver talking on the phone while driving on a road a serious DOT infraction." To the contrary, the following exchange took place during the General Counsel's questioning of Froslear:

> "Q: Would it be a major violation if the company had to spend thousands of dollars in fines?
>
> A: As a DOT violation?
>
> Q: As a DOT violation.
>
> A: No. That's out of our pocket.
>
> Q: But would that be a major violation if that occurred?
>
> A: Not the first time around, no."

(JA 85.) Thus, the testimony shows that Froslear did not consider Reed—whose original discipline stated that he and the Company could have been subjected to significant fines—to have committed a serious DOT infraction. The Board reasonably found this testimony to be incredulous.

could be inferred from an employer's discipline of an employee after the employer had reduced that employee's original discipline. 287 NLRB 1140, 1144-45 (1988.) Here, the Company reduced a comparable employee's discipline, but did not reduce Rottinghouse's discipline. If anything, this even more strongly smacks of disparate treatment.

Contrary to the Company's contention (Br. 22-23), Huff's written warning for transporting unsecure cargo was not the equivalent of Rottinghouse's written warning for the unsecured cylinders. Huff had a loose cylinder that Froslear testified "was rolling around on the floor" in addition to a pallet with unsecured cylinders and liquid containers only secured with one strap. (JA 378, 383; JA 74, 238.) The Company is simply incorrect that the judge "replaced the [Company] work rule with her subjective determination of danger levels." (Br. 22.) On its face, this incident was more serious than Rottinghouse's quickly-corrected incident involving tilted cylinders. Therefore, the Board reasonably concluded that "the cylinders on Huff's truck posed a much greater risk of danger than those on Rottinghouse's truck." (JA 357.)

Even the Company appears to have recognized that Huff's incident was more dangerous than Rottinghouse's—it required Huff to ride with a driver trainer, but it did not require Rottinghouse to do the same. (JA 366 n.11; JA 238.) Indeed, the Board aptly noted that the Company's failure to require such corrective training

for Rottinghouse even further undermined the safety justifications for his written warning. (JA 366 n.11.) Accordingly, contrary to the Company's contention (Br. 12, 22-23), Huff's written warning for a more serious cylinder incident does not undermine the Board's finding of disparate treatment.

The Company's assertion (Br. 24-25) that it gave Rottinghouse a written warning because it was not his first offense also rings hollow. Froslear did not claim reliance on any form of progressive discipline in the warning itself (despite having included specific language in that regard in other employee's discipline (JA 242), nor did he say anything about that during the grievance meetings on August 6 or September 2. It was not until responding to a question from union representative Butts in the September 23 grievance meeting that Froslear stated that one of the reasons that he would not reduce the written warning to a verbal warning was "because it is not Steve's first violation." (JA 377; JA 337.)[10] The Board was therefore eminently reasonable in finding that the suggestion that

[10] The Company's claim (Br. 23) that Froslear never testified that he gave the written warning as a form of progressive discipline elevates form over substance. As the Board recognized, in response to the question about whether the written warning was issued "because of progressive discipline," Froslear stated, "I mentioned to him that it wasn't his first offense." (JA 67.)

Rottinhouse's prior offense played a role in the written warning was "disingenuous at best." (JA 366 n.10.)[11]

Moreover, as discussed above at pp. 9-10, Froslear repeatedly, and disingenuously, pointed to the language in the collective-bargaining agreement (providing only for a written warning) in the September 2 and 23 grievance meetings, despite the Company's practice of nonetheless issuing verbal warnings for first offenses. As the Board aptly observed, Froslear's later suggestion on September 23 that a written, rather than verbal, warning was justified by Rottinghouse's earlier discipline "contradicts [Froselar's] other statements that there was no verbal warning option." (JA 366 n.10.)

Substantial evidence thus amply supports the Board's finding that Froslear's "inconsistent and shifting explanations" for issuing the written warning demonstrate "a finding of animus and that the [Company] was providing pretextual reasons for the written warning." (JA 366 n.10.) The Board also reasonably found, based on "the evidence as a whole," that Froslear "was not credible in

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[11] The Company's citation to *National Dance Institute*, 364 NLRB No. 35 (2016) is misplaced. Contrary to the Company's assertion, that case does not hold that if an employer can produce evidence of prior related disciplines, the employer "will prevail in the second stage of *Wright Line*." (Br. 25.) That case merely analyzed the evidence specific to that case to find that prior discipline supported the employer's decision in that case (364 NLRB No. 35, slip op. at 11), not a sweeping proposition that any prior related discipline will carry the day for every employer.

explaining why [he] gave Rottinghouse a written warning as opposed to an oral warning, and we find that the reasons it did give were a pretextual attempt to mask the [Company's] unlawful motivation, which was based on animus toward Rottinghouse's Board activity." (JA 366.) Such a finding of pretext necessarily means that the Company cannot establish it would have taken the same action absent the protected activity. *Conley v. NLRB*, 520 F.3d at 643. Thus, the Board concluded the Company "failed by definition" to show it would have taken the same action" absent his protected activity. (JA 364 n.2, 366-67.)

The Company's only remaining contention (Br. 16, 26)—that some "particularized" showing is required under the General Counsel's initial *Wright Line* burden— is also without merit. *See, e.g.*, *EF Int'l Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1, n.2, 2015 WL 5769947 (Oct. 1, 2015) (evidence that employer had "particularized motivating animus" against protected activity is not required), *enforced*, 673 F. App'x 1 (D.C. Cir. 2017); *Encino Hosp. Med. Ctr.*, 360 NLRB 335, 336 n.6 (2014) (*Wright Line* does not require a "further showing of particularized animus toward" protected activity). *FiveCap, Inc. v. NLRB*, 294 F.3d 768 (6th Cir. 2002), cited by the Company (Br. 16, 25-26), is not to the contrary, because it only mentions a "particularized showing" as rebuttal evidence to defeat an employer's legitimate reason for taking the action in question. *Id*. at

781. Here, in contrast, the Board explicitly found that the Company did not possess a legitimate reason for issuing the written warning.

CONCLUSION

The Board requests that the Court enter judgment denying the petition for review and enforcing the Board's Order in full.

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October 2018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AIRGAS USA, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 18-1686
v.	)	18-1771
	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its brief contains 6,660 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

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Dated at Washington, DC
this 17th day of October, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 17th day of October, 2018